

## **9. GERMANY**

### **Authors**

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### **Other administrative order**

YES

## **I. Procedural rules in calling for an expert examination**

### ***I. 1) On the initiative of***

The judge decides unilaterally if the expert examination is required, but in civil proceedings, the litigants must ask for such a measure when the burden of evidence lies with them. If both parties jointly request an expert examination, the judge cannot refuse it (a possibility which is rarely used).

The expert examination can be ordered by the trial judge if he believes that he does not have sufficient proof.

### ***I.2) Mandatory expert examinations***

Under exceptional circumstances, an expert opinion can be mandatory (before any wardship decision, for example).

### ***I. 3) Decision-maker***

The judge

### ***I. 4) Is a pre-trial expert examination possible?***

The expert examination can be the object of a summary judgement before any trial (“*selbständiges Beweisverfahren*”) if there is a risk of loss of evidence, or when the research of causes or the assessment of the costs of damage proves itself to be necessary or useful to avoid litigation.

## **II. Choice and appointment of the expert(s)**

### ***II. 1) Register***

The candidates are appointed as experts after following a strict selection procedure with the specialist units of regional governments, notably the chambers of commerce and industry, chambers of crafts, and, sometimes the order of architects and engineers, who all hold the expert registers. To be registered, the expert must usually prove that:

- there is a general need for experts in the targeted field
- he has knowledge specific to the field for which he seeks accreditation, knowledge which sets him apart from other experts

- he works in the private sector,
- there is no relationship of subordination which could influence the expert's independence, neutrality, or bias.
- he is over 30 and under 62 years old when applying.

Any person who meets the necessary conditions has a right to be accredited as expert. The capacity of expert is granted for a period of five years. Renewal can be sought at the end of this period, which is then good for a further ten years.

## ***II. 2) Oath***

The expert must give an oath, swearing to operate independently and impartially, and not to submit to instructions coming from the litigants or from third parties.

## ***II. 3) Choice of the Expert***

Normally, the judge appoints an expert listed on public registers, but the judge can also choose a professional who has not taken the oath (especially if the specialty required is not listed on the registers), as long as the expert has no personal interest in the litigation.

## ***II. 4) Participation by the parties in the appointment process***

If the litigants agree on the identity of an expert, the judge must accept this appointment.

## ***II. 5) Nationality***

EU and European Economic Area; the expert must live in Germany.

## ***II. 6) Recusal by the litigant parties***

The expert can be recused for the same reasons as the judge, except for those taken from the summons to be a witness: if the expert is a party to the trial, if there is any doubt on his impartiality, if he has a personal interest in the case or if he has or has had any ties with one of the litigants.

## ***II. 7) Expert's withdrawal (refusal of a mission)***

The expert can ask to withdraw for the same reasons that a witness can ask not to give a statement. He can also refuse by bringing to light the ties he has with one of the litigants and the possible bias it might provoke.

## ***II. 8) Possibility of adding another expert***

By the judge

## ***II. 9) Possibility of being assisted by a colleague***

YES

# **III. Definition of the expert's mission**

## ***III. 1) Who determines the mission?***

The judge is the only one who determines the mission (based on the litigants' request). The mission

depends on the issues for which the expert's technical or scientific knowledge is essential. Very specific questions of evidence are raised. But the litigants may, once they have received the report, ask supplementary questions, leading to – if the court allows it – a new phase of the expert examination.

### **III. 2) Type of mission**

UNSPECIFIED

## **IV. Progress of the expert's mission**

### **IV. 1) Judge supervision**

The court is in charge of the expert's mission; it can give instructions and explanations on the content of the mission and the way to carry it out.

### **IV. 2) Form of contradictory procedure**

The judge also decides on the level of interaction between the expert and the litigants. For example, he can allow them to take part in the investigations. The litigants may not unilaterally initiate contact with the expert. This first contact must mandatorily go through the court.

The expert can obtain from each litigant the documents necessary, as long as the other party is warned of it. If one of the litigants refuses to hand over documents, the expert can turn to the judge who will order them to be handed over. However, the expert is not required to immediately communicate to the litigants the evidence he has uncovered during his mission, and very often, this disclosure only happens when the expert examination report is handed in.

The expert cannot hear witnesses on his own initiative. If hearing witnesses becomes relevant during his mission, the expert must ask the judge for permission.

It is only after the report has been handed in that the litigants can bring their observations or present their objections. They can thus ask the judge to call the expert in for a hearing to ask him questions or point out potential contradictions in his report.

### **IV. 3) Participation in the hearing**

If requested, the expert can be called in for a hearing to complete or explain his conclusions.

## **V. Close of the expert examination:**

### **V. 1) Does conciliation put an end to the expert's mission?**

YES

### **V. 2) Form imposed on the report**

The results of the expert examination are generally presented in a written report but the judge can always order the expert to appear in front of the court to complete or explain his written conclusions. This is the case if the expert's report is insufficient or incomplete, if the judge does not understand it, especially in case of doubt, lack of precisions or thoroughness, in case of misunderstanding on the expert's part of the facts previously established by the court, or simply at the request of the litigants.

The expert examination report is one of the five forms of evidence allowed by the German Code of Civil Procedure. It is the form of evidence with the greatest value as evidence (a private expert examination is only documentary evidence).

**V. 3) Does the report put an end to the expert's mission?**

NO

**V. 4) Is there an imposed structure for the report?**

There are recommendations made by the expert institute (Institut für Sachverständigenwesen) as to the structure of the report.

**V. 5) Is a preliminary report mandatory?**

NO

**V. 6) Is the judge bound by the expert's conclusions?**

The judge is in no way bound by the expert's conclusions, but according to jurisprudence, the judge must explain the reasons for which he has not followed the expert in his judgement, and must instigate a new expert examination.

**V. 7) Possibility of a second opinion**

Possibility of a second opinion if the first is considered insufficient.

## **VI. Funding for the expert examination**

**VI. 1) Security – Payment**

In civil law, the litigant who carries the burden of evidence must make a security down payment to ensure the expert is remunerated.

**VI. 2) Determining the amount of payment due**

By the judge

**VI. 3) Possibility of additional payment**

YES

**VI. 4) Determining fees and costs**

The legal expert's fees are set by the *Justizvergütungs- und Entschädigungsgesetz* (law on remuneration in justice and on compensation), to an hourly rate which ranges from 50 to 95 Euros, plus expenses. The final tally of the operations is then sustained by the unsuccessful party.

**VI. 5) Possibility of contesting the fees**

YES

## **VII. Expert liability within proceedings**

### ***VII. 1) Are there any laws governing expert examinations?***

YES

### ***VII. 2) Expert liability***

Under the tort liability of legal experts, which is specifically regulated by the German Civil Code, the expert is liable for any gross negligence or wilful misconduct if the negligence or misconduct in his report leads to in a court ruling which is detrimental to one of the litigants..

### ***VII. 3) Mandatory insurance for the expert***

No, but the Chambers of Commerce and Industry with which the experts are registered often recommend taking out insurance.

## **VIII. The expert's status**

### ***VIII. 1) Existence of selection criteria (accreditation)***

YES

### ***VIII. 2) Classification of skills***

Nomenclature according to the organisation which provides accreditation.

### ***VIII. 3) Required qualifications***

Accreditation is given according to degrees and experience

### ***VIII. 4) Grant of accreditation***

Professions (chambers of commerce and industry, crafts trade chamber, chamber of architects...)

### ***VIII. 5) Possibility of accrediting a legal person***

NO

### ***VIII. 6) Validity period for the accreditation***

5 years, renewable for ten years.

### ***VIII. 7) Regular assessment tests***

Before renewing, the organisation providing the accreditation checks if the enrolment conditions are still valid (especially the mandatory on-going training).

### ***VIII. 8) Supervision of the expert's mission***

Qualitative.

### **VIII. 9) Expert's activity report**

No, unless the organisation providing the agreement requests it.

### **VIII. 10) Code of ethics**

Most of the chambers of commerce and industry have internal regulations which determine the rights and duties of experts, but the code of ethics is generally limited to the duty of fulfilling one's mission in good conscience, independently and impartially.

Example: [http://www.ihk-ordwestfalen.de/fileadmin/medien/02\\_Wirtschaft/55\\_Recht\\_FairPlay/11\\_Sachverstaendige/medien/SVO\\_20100609.pdf](http://www.ihk-ordwestfalen.de/fileadmin/medien/02_Wirtschaft/55_Recht_FairPlay/11_Sachverstaendige/medien/SVO_20100609.pdf)

### **VIII. 11) Good practice**

The expert's role is traditionally to assist the judge. He must restrict himself to a technical assessment of the issue presented and cannot provide any legal assessment of the dispute. That said, he must not shy from the legal aspects of the questions asked, to provide a technical answer which is as relevant as possible.

### **VIII. 12) Possibility of penalties**

YES

### **VIII. 13) Laws governing the expert's status**

Yes, notably § 39 Gewerbeordnung; Sachverständigenordnung of the chambers of commerce.

## **IX. Bibliography**

### **Literature**

- Bayerlein, Dr. Walter Praxishandbuch Sachverständigenrecht, fourth edition 2008
- Ulrich, Jürgen Der gerichtliche Sachverständige, twelfth edition 2007
- Zuschlag, Berndt Das Gutachten des Sachverständigen, second edition 2002
- Cors, Klaus G. Handbuch Sachverständigenwesen (Sachverständiger - wie werde ich das?), fourth edition 2006
- Wellmann, Carl R. Der Sachverständige in der Praxis, seventh edition 2004

### **Professional journals**

- a) not focused on a special field of expertise
  - Der Sachverständige Fachzeitschrift für Sachverständige, Kammern, Gerichte und Behörden (Verbandszeitschrift des BVS)
- b) focused on a special field of expertise (e.g.)
  - Der Bausachverständige Zeitschrift für Bauschäden, Grundstückswert und gutachterliche Tätigkeit
  - Der Kfz-Sachverständige